

STATE OF MICHIGAN
COURT OF APPEALS

NORTHLAND PROPERTIES, INC.,

Plaintiff-Appellee,

v

DEPARTMENT OF ENVIRONMENTAL
QUALITY,

Defendant-Appellant.

UNPUBLISHED

November 16, 2010

No. 291276

Cheboygan Circuit Court

LC No. 07-007790-AA

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

I. OVERVIEW

In this case, the Department of Environmental Quality (the Department) denied the application of plaintiff Northland Properties, Inc. to flood approximately 180 acres of forested wetland in Cheboygan County to create a duck pond. The circuit court determined that there was not competent, material, and substantial evidence on the whole record to support the denial. We conclude that the circuit court grossly misapplied the substantial evidence test when it focused its analysis, almost exclusively, on whether hardwood conifer swampland is rare in Michigan. Accordingly, we reverse.

II. BASIC FACTS

In 2002, Northland applied for the permit to flood the wetland. The hearing officer in the proposal for decision recommended the issuance of the permit under Parts 301 and 303 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.30101 *et seq.* and MCL 324.30301 *et seq.* However, the Department director rejected that recommendation. Of particular concern to the Department was the fact that the project would involve the destruction of approximately 16 acres of hardwood conifer swampland within the project area.

The affected parcel is part of a much larger parcel that, before Northland purchased it, the Abitibi Price Corporation owned, apparently for timbering operations. Abitibi installed an extensive drainage system in order to drain water from the land and increase forest growth. Northland purchased the land with the intention of thereafter selling it to the state for inclusion in the state forest program. When the state did not purchase the land, Northland sought other options. Ultimately, the Department included over 4000 acres of property, including the property at issue in this case, in the federal Wetland Reserve Program under which the federal

government paid the property owner for a permanent easement. Under the terms of the easement, the easement holder could enhance up to 30 percent of the wetlands as opposed to it being preserved or restored. In particular, according to Northland, there was an emphasis on open, shallow-water wildlife habitat to attract migratory waterfowl. According to Northland, the land at issue qualified for inclusion in the program because of the drainage system Abitibi installed. Initially, the Department granted a permit to allow the flooding of approximately 850 acres of the property. At issue here is the Department's denial of a permit for a second flooding of 180 acres to add to the previously flooded area.

After the Department denied the permit, Northland appealed to the circuit court. The circuit court determined that the final determination and order was not supported by substantial evidence on the whole record and reversed the Department's final determination and order. The Department now appeals.

III. DIVERSITY DETERMINATION

A. STANDARD OF REVIEW

When reviewing whether an agency's decision was supported by competent, material, and substantial evidence on the whole record, a circuit court should review the entire record.¹ Substantial evidence is evidence that a reasonable mind would accept as sufficient to support a decision.² Substantial evidence is more than a mere scintilla but less than a preponderance of the evidence.³ "Courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views."⁴

In reviewing a lower court's review of an agency decision, this Court then determines whether the circuit court "applied the correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test" in reviewing the agency's factual findings.⁵ This standard is the same as the clearly erroneous standard, where a finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made.⁶

¹ *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 588; 701 NW2d 214 (2005).

² *Dignan v Pub School Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002).

³ *Mantei v Pub School Employees Retirement Sys*, 256 Mich App 64, 71; 663 NW2d 486 (2003).

⁴ *Dignan*, 253 Mich App at 576.

⁵ *Mantei*, 256 Mich App at 71.

⁶ *Id.* at 71-72.

B. ANALYSIS

It is undisputed that the issue of particular concern supporting the Department's denial of the permit was the loss of the approximately 16 acres of hardwood conifer swampland within the project area. The Department concluded that the transformation of the swampland into open water would eliminate important wetland diversity. The circuit court ruled that the Department erred in this decision because there was not competent, material, and substantial evidence on the whole record to support the conclusion that transforming the swampland into open water would eliminate the project area's diversity. The circuit court based its decision on evidence that there are approximately 1.9 million acres of conifer swampland in Michigan, including over 50,000 acres in the local area. More specifically, the circuit court concluded that there was not substantial evidence on the whole record to support a conclusion that the conifer swampland was rare. Specifically, the circuit court stated:

The finding in the [final determination and order] that the destruction of this 16 acre conifer swamp would eliminate important wetland diversity would be supported by substantial evidence on the whole record if the record established that such wetlands were rare. The evidence, however, does not support that finding and therefore it is not supported by substantial evidence on the whole record.

In other words, the circuit court found that, for the Department's conclusion to be correct—that is, that the destruction of the conifer swampland would eliminate wetland diversity—it was necessary to first conclude that conifer swampland is rare in Michigan. However, the circuit court based its conclusion on a misunderstanding of the Department's reasoning as well as upon a flawed syllogism.

In considering Northland's permit application, the Department found that the proposed duck pond project was not in the public interest because it called for the destruction of the conifer swampland, which would eliminate the local wetland diversity. As the Department explained, "The project's conversion of existing and functioning wetlands to open water and destruction of the 16.6 acres of conifer swamp will degrade wetland functions and eliminate important wetland diversity." The Department based its decision on expert testimony that established that the conifer swampland provided important diversity to the wetland itself as well as to the habitat for wildlife. The expert testimony on which the Department relied established that the existing wetland provided greater habitat diversity than open water would provide. And the expert testimony established that many species of wildlife would be adversely affected by the change in habitat. Accordingly, the Department found that "the 16-plus acres of conifer swamp that would be destroyed by the proposal consists of mature trees and is a highly functioning wetland that provides much needed diversity in the project area." The Department later found that, "the negative impacts to the ecology and to wildlife are significant as a result of the loss of diversified habitat to open water." Finally, in analyzing whether an unacceptable disruption would result from issuance of the permit, the Department explained:

This 180-acre open water proposal would eliminate over 16 acres of conifer swamp, a resource that provides unique values not found in the majority of wetlands in the area. The conifer swamp wetland, and the values it provides

through diversity, would be irretrievably lost if this application is approved. In its place would be 45 acres of wetland [that] Northland claims will be converted from upland. The possibility that the conversion will be unsuccessful, or will not create wetlands that provide the values that currently exist in the conifer swamp, raises the disruption to an unacceptable level. In light of the fact that feasible and prudent alternatives exist to the proposed activity that will not adversely affect the aquatic resources, I find the proposed 180-acre open water project will cause an unacceptable disruption to the aquatic resources.

In analyzing the Department's determination, it is clear to us that its conclusion that the wetland diversity would be eliminated did not actually depend on a finding that the conifer swampland was rare. Although the Department mentioned that the conifer swampland provided "unique values not found in the majority of wetlands in the area[.]" this was not a central factor in the Department's decision. The Department clearly based its decision on the fact that the conifer swampland's existence contributed to the diversity of the local habitat, regardless of its commonness or rarity. Simply put, whether conifer swampland was rare or common was not central to the Department's decision to deny the permit. The circuit court's determination to the contrary was clearly erroneous.

Moreover, contrary to the circuit court's ruling, a determination that granting the permit would eliminate wetland diversity in the project area is not logically dependent on a finding that the conifer swampland was rare. The circuit court's logic, phrased negatively, can be viewed in the form of the following syllogism:

- Major Premise: Destruction of the conifer swampland will eliminate important wetland diversity, if the record establishes that the conifer swamp is rare.
- Minor Premise: The record does not establish that the conifer swampland is rare.
- Conclusion: Destruction of the conifer swampland will not eliminate important wetland diversity.

However, the circuit court's major premise is flawed.⁷ There is no basis—in the record or otherwise—upon which to conclude that the conifer swampland needs to be rare in order for its destruction to affect important wetland diversity detrimentally. Rather, it is logically manifest that elimination of even a universally common element from a particular ecosystem can cause detrimental effects on that ecosystem's diversity.

The Department explained repeatedly that, based on the record, elimination of the conifer swampland here would cause detrimental effects to the ecology and wildlife of the local wetland

⁷ Based on this conclusion, we do not address the Department's argument that the conifer swampland is in fact rare. Nor do we find it necessary to address the Department's argument regarding the feasible and prudent alternatives.

area. Accordingly, we hold that the circuit court grossly misapplied the substantial evidence test when it ruled that there was not competent, material, and substantial evidence on the whole record to support the conclusion that transformation of the 16 acres of hardwood conifer swampland into open wetlands would eliminate important wetland diversity. Again, we observe that the commonness or rarity of conifer swampland was not central to the Department's denial of the permit in question.

We reverse.

/s/ William C. Whitbeck

/s/ Stephen L. Borrello